

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

JOSEPH L.,

Claimant,

and

Inland Regional Center,

Service Agency.

Case No. 2011010321

DECISION

Donald P. Cole, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in San Bernardino, California on March 28, 2011.

The Inland Regional Center (IRC) was represented by Deborah Martinez, Consumer Services Representative.

Claimant Joseph L. was present at the hearing and was represented by Adam Berenson, Social Worker, County of San Bernardino.

The matter was submitted on March 28, 2011.

ISSUE

Is Joseph L. eligible for regional center services under the Lanterman Act on the basis of a diagnosis of mental retardation?

FACTUAL FINDINGS

1. Claimant Joseph L. is an 18-year-old male. Claimant lives in a six-bed foster-care group home in Chino.

2. On August 2, 2010, the service agency advised claimant of its determination that he was not eligible for regional center services. Claimant thereafter filed a fair hearing request, and the present hearing ensued.

3. Joseph uses complete sentences. He is able to express his needs and wants, but has difficulty explaining things to others. He is able to understand simple explanations given to him. His speech is clear and intelligible.

Joseph is able to use the fingers of both hands to manipulate objects. He eats with utensils without spillage. He toilets independently. He has complete bladder and bowel control. He performs personal care activities, but requires reminders for thoroughness. He dresses himself. He performs chores such as making his bed, putting laundry into the washer or dryer, and taking out the trash. He mows the lawn, pulls weeds, and is described as a good gardener. He knows the value of money, makes purchases, can identify coins, but cannot count change. He requires someone nearby during waking hours to prevent harm in all settings, e.g., he is impulsive and has a tendency to walk into the street. He is able to focus on a preferred activity for 30 minutes. He likes to play football and is described as being good at sports.

Joseph displays socially disruptive behaviors almost daily. He becomes loud and defiant. He has a history of running off when upset. He displays physical aggression about twice per week, but has not caused injury in at least the past year. He throws things (e.g., a chair) at others and makes verbal threats. He does not display self-injurious behavior and does not destroy property. He is hyperactive. He is able to participate in group activities or cooperate with peers only part of the time.

4. Claimant receives special education services through the Chino Valley Unified School District. His eligibility for those services is based on "Emotional Disturbances." Eligibility is not based on another available category, "Mental Retardation." He attends Canyon View School in San Dimas, a private institution for developmentally disabled students, which allows individuals who are beyond their senior year in high school to continue in an educational setting that is not at the college level. The school is designed for students between the ages of 18 and 22 who need to be closely supervised.

In February 2009, district school psychologist Modell McEntire¹ conducted a triennial psycho-educational assessment of Joseph. She conducted a number of tests, including the Comprehensive Test of Nonverbal Intelligence, the Woodcock Johnson Tests of Cognitive Ability-III, the Woodcock Johnson Tests of Academic Achievement-III, and the Vineland Adaptive Behavior Scales-2. She also observed Joseph in the classroom, interviewed his teacher, and reviewed records. She noted that Joseph scored "well below average" on a number of the tests administered. She concluded that he remained eligible for special education services. She did not specify any particular diagnosis. She did not state that Joseph was mentally retarded.

¹ McEntire's educational and professional background were not reflected in the record.

In May 2010, McEntire conducted another psycho-educational assessment, “requested by staff to consider a change of eligibility status.” She conducted a number of tests, including the Reynolds Intellectual Assessment Scales, the Berry Developmental Test of Visual-Motor Integration, the Street Survival Skills Questionnaire, and the Transition Behavior Scale-2. She also interviewed Joseph and his teacher and reviewed records. Joseph for the most part scored in the below average range on the tests administered. McEntire believed that “Joseph clearly presents with a number of global delays consistent with a diagnosis of mild to moderate mental retardation.” Stated slightly differently, “Based on the results of the current assessment, a diagnosis of mild to moderate mental retardation is supported by the findings of this report.” McEntire’s tentative language suggests some hesitancy on her part to make a formal diagnosis of mental retardation.

5. Jennifer Daly, Joseph’s former high school teacher for three years, has a moderate-severe level one teaching credential and a Master’s degree in moderate-severe special education. She testified concerning Joseph’s impairments in the seven components of a “substantial disability,” as that term is defined in the California Code of Regulations.² She described Joseph’s struggles, frustrations, and behavioral problems in those areas. She understood that Joseph has emotional disturbances. She did not believe, however, that his emotional disturbances were the cause of his inability to function in the classroom, because everything that went on in class was modified to take his emotional problems into account. Daly does not believe Joseph can function at a level that would enable him to live independently.

6. In a March 25, 2011, letter, Eric Anderson, Joseph’s current Canyon View School teacher, wrote that Joseph “has significant delays in all areas of academic functioning, performing between the 2nd and 3rd grade levels, based on student’s performance and work samples.”

7. Adam Berenson, a social worker with the County of San Bernardino, was assigned to Joseph’s case in the fall of 2009; he was Joseph’s social worker for about a year. Berenson has a Bachelor’s degree in social science and a Master’s degree in social work. Berenson testified that he believes the results of Joseph’s IQ tests reflect a certain ambiguity. Both IQ tests reflected full-scale scores below 70 and were thus in the mild mental

² California Code of Regulations, title 16, section 54001, defines the term “substantial disability” as “(1) A condition which results in major impairment of cognitive and/or social functioning, representing sufficient impairment to require interdisciplinary planning and coordination of special or generic services to assist the individual in achieving maximum potential; and (2) The existence of significant functional limitations, as determined by the regional center, in three or more of the following areas of major life activity, as appropriate to the person’s age: (A) Receptive and expressive language; (B) Learning; (C) Self-care; (D) Mobility; (E) Self-direction; (F) Capacity for independent living; (G) Economic self-sufficiency.”

retardation range. At best, in Berenson's opinion, Joseph is borderline. Further, and in light of the ambiguity reflected in Joseph's scores, one should look to Joseph's real-world performance. Based on Daly's testimony, Joseph has genuine deficiencies, both cognitive and cognitive-emotional. In Berenson's opinion, it is Joseph's cognitive deficits that lead to his emotional problems, not the reverse. Berenson does not believe Joseph is able to live independently.

8. On August 2, 2010, Edward G. Frey, Ph.D., conducted a psychological assessment of claimant, on referral from the service agency. Among the tests he administered were the Wechsler Adult Intelligence Scale-IV, the Wide Range Achievement Test-IV, and the Vineland-II Adaptive Behavior Scales. Based on the testing he conducted and his review of previous testing and other information, Dr. Frey believed that Joseph "is best viewed as functioning in the borderline range. His current perceptual reasoning or performance IQ is well into the borderline range. Processing speed is also borderline. Joseph has a weakness in the verbal area." His diagnosis on Axis I was "Diagnosis deferred to treating physician." His diagnosis on Axis II was "Borderline intellectual functioning." He concluded:

In summary, current psychological testing, although somewhat variable, would not fully support a diagnosis of mental retardation at this time. Current testing, as well as review of history and previous testing, suggests that Joseph is probably better viewed as a young man falling within the borderline range of intelligence. There is a co-existing psychiatric and behavioral disorder.

9. On March 1, 2011, Michelle Molina, Ph.D., conducted a psychological assessment of Joseph, on referral from Joseph's foster mother and operator of the group home where Joseph resides. Dr. Molina interviewed Joseph and conducted a number of psychological tests, including the Brief Neuropsychological Cognitive Exam, the Vineland Adaptive Behavior Scales, the Wechsler Adult Intelligence Scale, and the Wide Range Achievement Test. On the cognitive exam, Joseph's score was "indicative of mild cognitive impairment." On the Wechsler, Joseph's scores "suggest[ed] that he has deficient ability in all areas." On the Vineland, Joseph's scores indicated "social maturity at the prevalent age of 14-years-old," so that "his ability to function independently is extremely limited." On the achievement test, Joseph "showed academic skills falling within the second grade range consistent with his diminished cognitive ability."

Dr. Molina's conclusion involved a number of areas of concern. With regard to cognitive ability and related issues, she stated:

Joseph presented to the evaluation with an extremely silly and immature attitude demonstrating inappropriate eye contact and low social awareness. His expressive and receptive language was demonstrative of someone with lack of vocabulary due to limited cognitive ability. In addition, cognitive testing results suggest the patient to have a severe impairment in his conceptual thought process, and often become disoriented to his surroundings,

and to have significant problems in memory. In addition, his thought process is often halted by emotional factors. Cognitively, the patient's ability was measured as falling within the deficient range and his academic scores indicate second-grade level skills. His adaptive functioning levels are low in all areas.

Dr. Molina's diagnostic impressions included Mood Disorder, Not Otherwise Specified (Axis I) and Mild Mental Retardation (Axis II).

10. Dr. Sandra Brooks, Ph.D., clinical psychologist, conducts eligibility assessments for the service agency. She has not tested Joseph, but has reviewed his file.

Dr. Brooks reviewed Dr. Frey's evaluation. Dr. Brooks noted that Joseph's scores on the Wechsler reflected substantial "scatter," i.e., a wide range of scores, from average intelligence to significantly sub-average functioning. Dr. Brooks seemed to be of the view that such scatter cast a certain degree of doubt on the validity of the scores. Dr. Brooks noted that Joseph's full-scale IQ score was 66, which would normally be in the mild mental retardation range.³ She added, however, that when, as in Joseph's case, there is a 15 to 20 point discrepancy among the four Wechsler index scores from which the full-scale IQ is derived, the general interpretive rule is that the full scale IQ score is to be viewed "with caution," i.e., is not necessarily valid. Dr. Brooks also noted Dr. Frey's impression that some of Joseph's cognitive and adaptive skills weaknesses seemed to be due to emotional (e.g., attention deficit, anger management) issues. Based on these considerations, Dr. Brooks understood Dr. Frey to have determined that despite Joseph's low full-scale IQ score, and in the appropriate exercise of his professional judgment on the basis of all available information, he did not have mental retardation.

Dr. Brooks reviewed Dr. Molina's evaluation. Dr. Brooks noted that Dr. Molina appeared to have used an older version of the Wechsler test, presumably Wechsler-III.⁴ Dr. Brooks explained why she believed the Wechsler-III was no longer a valid test, e.g., the overall intelligence of the general population increases over time, so that newer versions of Wechsler adjust the scoring to take into account that incremental increase. Dr. Brooks also found significant that Joseph's score on the Wechsler administered by Dr. Molina yielded a *lower* full scale IQ score (61) than did the Wechsler-IV exam administered by Dr. Frey (66): this indicated to Dr. Brooks that Joseph had some abilities that for whatever reason were not "tapped" in the earlier version of Wechsler administered by Dr. Molina.

³ Dr. Brooks stated that the mild mental retardation range is from about 50 to 70, and that the borderline range is from about 70 to 79.

⁴ Versions older than Wechsler IV had only two sub-scales, instead of four. Dr. Molina's Wechsler had two scales.

11. Based on the entirety of the evidence presented, it was not established that claimant has mental retardation.

Dr. Frey concluded that Joseph did not have mental retardation. The testimony of Dr. Brooks shed substantial light on the significance of Dr. Frey's specific findings, and constituted a clear, reasonable explanation as to why Joseph was not mentally retarded, despite his two IQ test scores below 70. Dr. Molina's contrary conclusions are subject to some question in that she used an outdated version of the Wechsler test. While she could perhaps have explained her rationale for so doing had she testified, she did *not* testify, and thus her decision in this regard remains unexplained.

Though school psychologist's McEntire's May 2010 assessment suggested that Joseph is mentally retarded, her somewhat tentative language suggests some uncertainty on her part in this regard. Indeed, the school district declined to base its eligibility determination on mental retardation. The testimony or statements of Daly, Anderson, and Berenson certainly raised valid concerns about respondent's substantial deficits, but none of the individuals opined (nor were they in a position to do so) that respondent was mentally retarded. While the evidence did not conclusively demonstrate that Joseph is not mentally retarded, neither did it demonstrate that he was. It is Joseph, however, who bore the burden of proof. Based on the entirety of the evidence, he failed to meet that burden. Accordingly, he is not eligible for regional center services.

LEGAL CONCLUSIONS

1. "Burden of proof" means the obligation of a party to establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact or the court; except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence. (Evid. Code, § 115.) Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting. (Evid. Code, §500.) The burden of proof is thus on claimant to establish eligibility for regional center services.

2. Pursuant to Welfare and Institutions Code section 4512:

(a) "Developmental disability" means a disability that originates before an individual attains age 18 years, continues, or can be expected to continue, indefinitely, and constitutes a substantial disability for that individual. As defined by the Director of Developmental Services, in consultation with the Superintendent of Public Instruction, this term shall include mental retardation, cerebral palsy, epilepsy, and autism. This term shall also include disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation, but shall not include other handicapping conditions that are solely physical in nature.

3. By reason of Factual Findings 1 through 11 and Legal Conclusions 1 and 2, it is concluded that the service agency correctly determined that claimant does not have mental retardation and is thus not eligible for services and supports under the Lanterman Act.

Accordingly, there is hereby issued the following:

ORDER

The service agency's determination that claimant Joseph L. is not eligible for regional center services is upheld.

DATED: April 12, 2011

DONALD P. COLE
Administrative Law Judge
Office of Administrative Hearings

NOTICE:

This is the final administrative decision in this matter. Both parties are bound by this decision. Either party may appeal this decision to a court of competent jurisdiction within ninety (90) days.